IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 224 of 2005
With
CIVIL REVISION APPLICATION No. 225 of 2005
With
CIVIL REVISION APPLICATION No. 226 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

==========

KIRITBHAI BHOGILAL KAYASTHA - Applicant(s)

Versus

STATE OF GUJARAT & 3 - Opponent(s)

==========

Appearance :
MR MP SHAH for Applicant(s) : 1,MS. KRUTI M SHAH for Applicant(s) : 1,
GOVERNMENT PLEADER for Opponent(s) : 1,
DS AFF.NOT FILED (N) for Opponent(s) : 2, 4,
MS SEJAL K MANDAVIA for Opponent(s) : 3,
==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 07/10/2005

COMMON ORAL JUDGMENT

1. Heard Ms.Kruti M. Shah, learned counsel appearing for the petitioner, Mr.U.R. Bhatt,

ld.AGP, appearing on behalf of the respondent-State and Ms.Sejal Mandavia, learned counsel appearing on behalf of respondent no.3. Mr.Sukhdev Chaudhari, Secretary of Village Panchayat, Kadod, Tal. Bardoli, Dist.Surat, is also present.

2. In all the three Revision Applications, the order passed below application Exh.32, 33 and 33 respectively, have been assailed by way of aforesaid Revision Applications under Section 115 of the Code of Civil Procedure, whereby the ld.Civil Judge (S.D.), Bardoli vide order dated 04th April, 2005 rejected the request of the petitioner-orig.plaintiff to draw a decree in absence of written statement in view of scheme of Order 8 Rule 10 of the Code of Civil Procedure.

3. I have considered the totality of facts and circumstances of the cases emerging from record and the copy of the proceedings produced by the

petitioner. The learned Judge has said that it is a discretion vested with the Court whether to draw a decree directly in absence of written statement or not and therefore, the Court is not inclined to draw a decree as prayed for. For short, the Court had indirectly said that the plaintiff shall prove his case and satisfy the Court as to whether he deserves decree or not.

4. The learned counsel appearing for the petitioner has placed reliance on the observations made by the Apex Court in the case of ***Om Prakash Gupta v. Union of India and another, reported in 2000 (6) Supreme 486.*** The learned Judge has referred to one more decision in the order under challenge i.e. decision in the case of ***Chandrakant Champaklal v. Babubhai Vitthaldas Thakkar, reported in 1995(2) GCD 401 (Guj)***. The Court has said that the word 'shall' used in Rule 10 should be read as 'may'. Thus, the scheme has been interpreted as directory. When the scheme of statute is found directory,

element of judicial discretion and/or discretional jurisdiction enters. It is relevant to note that in the recent decision of the Apex Court in the case of ***Kailash v. Nanhku and ors., reported in 2005 AIR SCW 2346***, the Apex Court has observed as under :

> ***"31.*** *Our attention has also been invited to a few other provisions such as Rules 9 and 10 of Order VIII. In spite of the time limit appointed by Rule 1 having expired, the court is not powerless to permit a written statement being filed if the court may require such written statement. Under Rule 10, the court need not necessarily pronounce judgment against the defendant who failed to file written statement as required by Rule 1 or Rule 9. The court may still make such other order in relation to the suit as it thinks fit."*

5. In one more decision, the Apex Court has held that even in ex-parte proceedings necessity of plaintiff proving his case would not lost. In case of ***Ramesh Chand Ardawatiya v. Anil Panjwani, reported in AIR 2003 SC 2506***, the Apex Court has said that :

> *"33. ... Thus, from the point of view of the present defendant, we cannot find any such defect or infirmity in the relief sought for by the plaintiff as would render the suit not maintainable and liable to be thrown out at the threshold. But there is substance in the other limb of this submission made by the learned senior counsel for the defendant-appellant. Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order VIII, Rule 10 of the Code of Civil Procedure is attracted and the Courts acts*

thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the Court is not bound to frame issues under Order XIV and deliver the judgment on every issue as required by Order XX, Rule 5. Yet the trial Court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the points for determination and proceed to construct the ex parte judgment dealing with the

points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence."

6. In view of the above, it is discretionary power vested with the Court whether straight way a decree can be passed in view of the provisions of Order 8 Rule 10 of the Code of Civil Procedure and the ld.Presiding Judge of the Court may not be compelled in all cases or in all circumstances to draw a decree in favour of the plaintiff where there is no written statement or the request to file written statement has been turned down.

7. For short, I do not find any perversity or illegality or even jurisdictional error in the orders under challenge and therefore, the

present Revision Applications are hereby dismissed.

(C.K. Buch, J)

Aakar